Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1978

No. [redacted]77-6645

POMPIE JUNIOR WADE, Petitioner

vs.

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1978

No. _____

POMPIE JUNIOR WADE, Petitioner

vs.

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

POMPIE JUNIOR WADE, the Petitioner herein, prays that a Writ of Certiorari issued to review the judgment of the Supreme Court of Ohio entered in the above entitled case on March 22, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 53 Ohio State Second 182 and appears in Appendix A hereto, page 1. The judgment of the Ohio Eleventh District Court of Appeals is unrecorded and appears in Appendix A hereto at page 11. The Journal Entry of Judgment of the Common Pleas Court of Trumbull County, Ohio appears in Appendix A hereto, page 21.

JURISDICTION

The judgment of the Supreme Court of Ohio (Appendix A page 22) was entered on March 22, 1978; a timely Petition for Rehearing was denied on the 14th day of April, 1978. (Appendix A, page 24) The jurisdiction of this Court is invoked under 28 USC Section 1257(3), Petitioner having asserted below

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and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Prosecutor, in summation, made impermissible comments on Petitioner's failure to testify and upon Petitioner's failure to produce evidence and thereby violated his rights under the Fifth and Fourteenth ammendments.

2. Whether Petitioner's sentence of death is constitutionally valid.

3. Whether the Trial Court's conduct during the trial of the case below violated the Petitioner's rights to a fair trial.

4. Whether the denying of Petitioner's attempt to question the jurors on voire dire relative to their views on capital punishment denied the Petitioner a fair and impartial jury.

5. Whether the use of a questionaire submitted to jurors in advance asking the question, "opposed to capital punishment _____?", gives the Petitioner the right to ask jurors on voire dire their viwes on capital punishment.

a. Whether prohibiting Petitioner from making such an inquiry deprives him of a fair and impartial jury, due process and equal protection of the law.

STATUTES INVOLVED

1. U.S. Constitutional provisions:

a. Ammendment 4

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized."

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b. Ammendment 5

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

c. Ammendment 6

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been commited . . ."

d. Ammendment 8

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

e. Ammendment 14

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Ohio Constitutional provisions involved:

a. Article One, Section 10

" . . . no person shall be held to answer for a capital or otherwise infamous crime . . . and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed . . ."

b. Article One, Section 10

"No person shall be compelled to comment in any criminal case, to be a witness against himself . . ."

c. Article One, Section 14

"The right of the people to be secure in there persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

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3. Ohio Rules of Criminal Procedure, Rule 33

a. Rule 33, New trial grounds.

"A new trial may be granted on motion of Defendant for any of the following causes effecting materially his substantial rights:

(2) Misconduct of the jury, Prosecuting Attorney (emphasis added) or the witnesses for the State . . ."

4. Ohio Revised Code provisions involved:

a. O.R.C. 2313.01 et seq Appendix A hereto, page 25.

b. Ohio Revised Code 2945.18 et seq Appendix A hereto, page 27.

c. O.R.C. 2903.01, Appendix A hereto, page 29.

d. O.R.C. 2929.02, Appendix A hereto, page 29.

e. O.R.C. 2929.03 et seq. Appendix A hereto, page 29.

f. O.R.C. 2929.04 et seq. Appendix A hereto, page 28.

STATEMENT

Prior to the jury being impanelled during trial in the Trumbull County Common Pleas Court of Ohio, prospective jurors were provided with a questionaire asking if they were opposed to capital punishment. In addition, during voire dire, Defendant's Counsel attempted to ask jurors their views on capital punishment but was denied the right to do so.

Defendant did not testify or produce any evidence during trial, yet repeatedly during the trial, the State referred on at least ten (10) different occasions to the Defendant's lack of testimony and to the lack of testimony by the Defendant in general. Referring to such void in testimony by the Defendant as uncontradicted evidence and justice being a two-way street.

Moreover, the trial judge repeatedly interrupted the trial and failed to give his complete and undivided attention to the trial of the case. After a trial to a jury the Defendant

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was found guilty on all charges including the specifications of aggravated circumstances.

The Petitioner in this case was indicted by the Trumbull County, Ohio grand jury for committing the felonies of aggravated murder with specified aggravated circumstances, attempted aggravated murder and aggravated robbery. On March 8, 1976, trial began on the above charges before a jury in Trumbull County Common Pleas Court of Ohio. On March 17, 1976, judgment was entered against the Petitioner on all counts listed above. On April 23, 1976, a hearing was held before the Honorable Judge Riegelhaupt to determine whether mitigating circumstances existed. On April 29, 1976, the Court found no mitigating circumstances and therefore, pursuant to law of the Court, sentenced the Defendant to death and two consecutive seven (7) to twenty-five (25) year sentences for his other convictions. Petitioner's attorney filed a Motion for new trial which was overruled and present Counsel filed a Notice of Appeal in Eleventh District Court of Appeals. Counsel for Petitioner raised issues involving the U.S. Constitution in Petitioner's appeal before the Eleventh District Court of Appeals for Ohio. Specifically, Counsel raised issues involving the U.S. Constitution, Ammendments Four, Five, Six, Eight, and Fourteen. The Eleventh District Court of Appeals affirmed the convictions of the Petitioner on June 17, 1977 and Petitioner appealed to the Supreme Court of the State of Ohio as a matter of right.

The Petitioner again, before the Supreme Court of Ohio, raised issues involving the U.S. Constitution, Ammendments four, five, six, eight, and fourteen. The Supreme Court of the State of Ohio on March 22, 1978, affirmed the convictions of Petitioner and issued its mandate that Petitioner die in the electric chair on May 22, 1978.

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On the 4th day of April, 1978, Petitioner filed a Motion for a Rehearing before the Ohio Supreme Court and a Motion for Stay of Execution of the Death Penalty.

REASON FOR GRANTING THIS WRIT

1. During the course of summation by the Prosecuting Attorney in the trial of POMPIE JUNIOR WADE, the Prosecution repeatedly referred to the evidence as"uncontradicted facts." Moreover, the Prosecution repeatedly referred to the lack of evidence by any witness on behalf of the defense. The Prosecution, in addition, told the jurors that justice is a ~~one way~~ TWO WAY street and is not a one-sided thing. Defense Counsel objected. The Trial Court instructed the jury that the Defendant was not under any obligation to testify,but then the Prosecution completely ignoring the Court's instruction again commented on the Defendant's silence. In its opinion, the Supreme Court of Ohio (State vs. Wade, 53 Ohio State Second 182) completely ignored the U.S. Supreme Court case of O'Conner vs. Ohio (1966 385 US 92). The Ohio Supreme Court held in its opinion that the Petitioner during trial did not object to the Prosecutor's comments and therefore, waived his right to object at this stage of the proceedings. We submit O'Conner supra, is controlling and that the Ohio Supreme Court was in error.

2. As construed and applied by the Ohio Supreme Court, the Ohio Revised Code, Section 2929.04 et seq imposes cruel and unusual punishment and violates the eighth and fourteenth ammendments of the Constitution of the United States; the actual imposition of the death penalty and the manner in which the death penalty is imposed is unconstitutional and that the burden of proving mitigating factors by propoundence of evidence is placed upon the Defendant. And further, that the imposition of the

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death penalty in Ohio precludes the jury from expressing any opinion as to whether the ultimate penalty should be imposed.

3. During the jury selection of the above-entitled action in the Trumbull County Common Pleas Court, the Defendant was prohibited from asking the prospective jurors their views on capital punishment. We insist this is a right which the Defendant must exercise in this particular case, because in Trumbull County Common Pleas Court, the practice at the time of the trial of this action was to send questionaires to all prospective jurors. The prospective jurors all answered the question, "opposed to capital punishment _____?". Such a questionaire is then made available to the Defendant and the Prosecution; and the Petitioner contends that when such a question is asked, the jury is made aware that capital punishment is, in fact, an issue, and that the Defendant at trial had a right to explore possible bias of the jurors.

4. During the trial of the action,the Trial Court, before a jury,failed to give his complete and undivided attention to the trial of the action and by the Prosecution's own admission, diverted his attention from the trial to other business of the Court. In addition, the banter between the Defense Counsel and the Trial Court, while recognized by the Ohio Supreme Court as an attempt at good natured humor, has no place in the trial of a serious offense such as a murder trial. The Defendant's right to a fair and impartial trial court was violated by the Trial Court's inattention, disregard for decorum of the Court room, and Petitioner's right to a fair and impartial trial judge.

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CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 19, 1978

Appendices

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APPENDIX A, the opinion of the Court in Ohio v. Wade, (1978), 53 Ohio St.2d 182, has not been reproduced here.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 78 TERM
To wit: March 22, 1978

State of Ohio,
Appellee,

vs.

Pompie Junior Wade,
Appellant.

No. 77-716

APPEAL FROM THE COURT OF APPEALS

for TRUMBULL *County*

This cause, here on appeal from the Court of Appeals for TRUMBULL *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed* for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 22nd day of May, 1978, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Trumbull County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* TRUMBULL *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this day of 19

Clerk

Deputy

BEST COPY AVAILABLE

SC-18 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*78 *TERM*

To wit: April 14, 1978

State of Ohio,
Appellee,

vs.

Pompie Junior Wade,
Appellant.

No. 77-716

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th *day of* April *19*78

THOMAS L. STARTZMAN *Clerk.*

By .....Deputy.

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§ 2313.01 Commissioners of jurors. (GC §§ 11419-3, 11419-2)

The judges of the courts of common pleas shall appoint two suitable persons, neither of whom shall be an attorney at law nor more than one of whom shall be of the same political party, to be commissioners of jurors for the county. The appointments shall be made in writing, by the judge or a majority of all the judges in those counties where there is more than one judge, and shall be filed in the office of the clerk of the court of common pleas of the county and entered upon the journal of the court. The commissioners shall hold office at the pleasure of the judges of the court of common pleas in the county of their appointment. The judges may at any time for good cause shown and by a vote of a majority of all their number, remove any commissioner and appoint a successor. Upon a vacancy occurring in the office of commissioners of jurors, for any cause, the said judges shall, as soon as practicable, in like manner appoint a successor. The successor so appointed shall be of the same political party as the commissioner whose place is to be filled.

The said commissioners shall be officers of the courts of record in such county and shall attend upon each term of such courts for which a jury is drawn.

HISTORY: GC §§ 11419-3, 11419-2; 114 v 193 (194). Eff 10-1-53. GC § 11419-3 analogous to former GC §§ 3007, 11421, 11425. GC § 11419-2 analogous to former GC § 11421.

§ 2313.08 Annual jury list. (GC §§ 11419-41, 11419-9)

The jury year in each county shall begin on the first Monday of August of each year, provided the court of common pleas may designate otherwise. A new and complete jury list shall be made up annually by the commissioners of jurors and shall be certified by them and filed in their office before the beginning of each jury year. The said names shall be entered in a suitable book or record, to be known as the "annual jury list," and shall be arranged alphabetically so far as practicable and under convenient divisions by precincts, districts, and townships, and shall be properly indexed. With each name shall be recorded the occupation, place of business, and place of residence, as nearly as the same can be ascertained. A duplicate of said annual jury list shall be certified by the commissioners and filed in the office of the clerk of the court of common pleas, and the commissioners may, by order of the court, add to said list, or enter on a supplementary list, the names of persons, their occupations, place of business, and place of residence, who shall thereafter be discovered to be qualified to serve as jurors.

In the selection of the names for said compiled list, unless otherwise ordered by the court, the commissioners shall proceed to assign a consecutive number to each name upon said list of electors, starting with one, and shall use, for the purpose of compiling said list of prospective jurors, a key number which shall be designated by the court. Said commissioners shall proceed to select from said list of electors the name of each person accordingly as the key number so designated, or the multiples thereof, appear opposite said names on said list, until a sufficient number of such names are selected to make up the required number of prospective jurors.

The commissioners of jurors may serve personally or by mail on any person within the county, a notice requiring him to attend before a commissioner at a specified time, not less than five days after service of the notice, for the purpose of testifying concerning his own qualifications or liability, or those of any other person, to serve as a juror. A person so notified must attend and testify accordingly.

§ 2313.11 Failure to attend or testify; dispensation of personal attendance. (GC § 11419-13)

If a prospective juror fails to attend as specified in the notice referred to in section 2313.10 of the Revised Code, for any cause except physical disability, or if he refuses to be sworn, or to answer any legal and pertinent question put to him by a commissioner of jurors, such fact shall be reported by the commissioner to the court and such person shall be dealt with as for contempt of court. One or more successive notices may be served upon the same person when he fails to attend as required by the former notice and he shall be liable to punishment as for contempt of court for each failure to attend. A commissioner may dispense with the personal attendance of a person so notified, when another person cognizant of the facts is produced and testifies in his stead. When a person has so attended twice for examination, he cannot be required to attend again in the same jury year.

HISTORY: GC § 11419-13; 114 v 193 (197). Eff 10-1-53. Analogous to former GC § 11423.

§ 2313.15 Report of names of jurors excused to subsequent term. (GC § 11419-17)

The commissioners of jurors shall report the names of all jurors excused to a subsequent term as provided in section 2313.13 of the Revised Code, to the officers attending the drawing of the jurors for that term, and each such name shall be placed upon the list of jurors drawn as provided by sections 2313.01 to 2313.46, inclusive, of the Revised Code. Such juror shall be made one of the total number directed to be drawn for that term, and no more names shall be drawn from the jury wheel than are sufficient to make up the number ordered by adding the names of the jurors so excused to the names then drawn.

HISTORY: GC § 11419-17; 114 v 193 (198). Eff 10-1-55. Analogous to former GC § 11430.

§ 2313.16 Juror may be excused. (GC § 11419-18)

Except as provided by section 2313.13 of the Revised Code, the court of common pleas shall not excuse a person, liable to serve as a juror and drawn and notified, unless it is shown by the oath of the juror, or if he is unable to attend, by the oath of another person acquainted with the facts, that:

(A) He is then necessarily absent from the county, and will not return in time to serve;

(B) The interests of the public, or of the juror, will be materially injured by his attendance;

(C) He is physically unable to serve;

(D) His wife, or a near relative of himself or his wife, has recently died or is dangerously ill.

When a person liable to serve is excused, in a case specified in this section, or when a person notified to attend a term as a juror is entitled to and claims an exemption, he can be excused only by the judge presiding at the term which he has been notified to attend. Such an excuse shall not extend beyond that term.

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§ 2313.17 Excuse presented in open court. (GC § 11419-19)

A person who has been notified to attend as a juror and who makes application to be excused as provided by section 2313.16 of the Revised Code, on the ground that he is not qualified, or is exempt, shall present his excuse in open court to the judge. If such person cannot personally attend, he shall send his excuse by a person capable of making the necessary proof in relation to his claim to be excused. A note of the excuse and of the reason therefor shall be made and attested by the court, and shall be transmitted to the commissioners of jurors by the clerk of the court of common pleas, as part of the return made, as prescribed in sections 2313.01 to 2313.46, inclusive, of the Revised Code.

HISTORY: GC § 11419-19; 114 v 193 (198). Eff 10-1-53. Analogous to former GC § 11430.

§ 2313.18 Certified copies of venires; certificate of clerk; contents; duplicate; contempt. (GC § 11419-20)

The clerk of the court of common pleas shall within ten days after the close of each term for which jurors have been drawn, or after the discharge of the jurors, if they are discharged before the close of the term, return to the commissioners of jurors certified copies of the venires containing the names of such jurors, and each notice or other papers attested by the court, as prescribed in sections 2313.01 to 2313.46, inclusive, of the Revised Code. The clerk shall deliver to the commissioners therewith his certificate specifying distinctly and in detail, as follows:

(A) The name and residence of each juror who attended and served, the number of days he actually served, the particular dates thereof, and also the amount paid to him for attendance;

§ 2313.42 Causes for challenge of persons called as jurors; examination under oath.

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications.

The following are good causes for challenge to any person called as a juror:

(A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;

(B) That he has an interest in the cause;

(C) That he has an action pending between him and either party;

(D) That he formerly was a juror in the same cause;

(E) That he is the employer, employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

(F) That he is subpoenaed in good faith as a witness in the cause;

(G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;

(H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;

(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be

§ 2313.21 Conducting of drawing. (GC § 11419-24)

The drawing of jurors under section 2313.23 of the Revised Code shall be conducted as follows:

(A) One of the commissioners of jurors shall thoroughly mix the ballots in the jury wheel without exposing them.

(B) The commissioner shall then, without seeing the name on the ballot, publicly draw out of the jury wheel one ballot and continue to draw in like manner one ballot at a time, until the required number has been drawn. Whenever a ballot containing a name that has been stricken from the jury list is drawn, it shall be destroyed immediately, and another drawn in its place.

(C) The clerk of the court of common pleas shall enter on a venire the name and place of residence contained on each ballot drawn, before another ballot is drawn, unless the name contained on such ballot has been stricken from the jury list.

(D) After drawing the requisite number, the venires, containing the names and the respective places of residences of the persons drawn, and specifying for what court and for what term they were drawn, shall be signed by the clerk or his deputy and all the attending officers, and delivered to the sheriff for service. The officers shall also certify that sections 2313.01 to 2313.46, inclusive, of the Revised Code, have been complied with.

(E) When the drawing is finished, the jury wheel shall be closed and sealed in the presence of the officers. All ballots so drawn out of the jury wheel and not required to be returned to it, shall be delivered to the clerk for use during the term of court.

(F) If the term consists of two or more separate parts, the jurors for each part shall be drawn, and venires shall be issued, and the subsequent proceedings shall be the same as if it were a distinct term, but such jurors upon an order made by any of the judges holding one of such parts and approved by the judge holding another part of the same jury year shall be interchangeable between such parts, and shall serve in any of such parts and for such length of time, not exceeding each juror's legal term, as such order designates.

HISTORY: GC § 11419-24; 114 v 193 (200). Eff 10-1-53. Analogous to former GC §§ 11426, 11427, 11433.

§ 2313.23 Drawings to be public; when held; designation; witnesses and assistants. (GC § 11419-22)

All drawings of jurors shall be public on a day designated by the commissioners of jurors, not less than fourteen nor more than twenty-eight days before the day appointed for holding a term of a court of record, at which issues of fact are triable by jury. A commissioner, the sheriff of the county, in person, or by his deputy, and a judge of the court of common pleas, together with the clerk of the court of common pleas, or his deputy, shall attend at the office of the commissioners to witness and assist in the drawing of jurors for the term.

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§ 2945.18 Venire for jury in capital cases.

When a person indicted for a capital offense pleads not guilty, the clerk of the court of common pleas shall draw from the jury wheel, or draw by utilizing the automation data processing equipment and procedures described in section 2313.07 of the Revised Code, not fewer than fifty nor more than seventy-five ballots or names, as the court directs, and issue to the sheriff a venire for the persons whose names are so drawn for the day fixed for the trial. The venire shall be served and returned by the sheriff at least fifteen days before the date fixed for trial. A copy of such venire and such return shall be served on the defendant at least three days before the date of the trial.

§ 2945.19 Special venire in capital cases.

Jurors summoned as provided in section 2945.18 of the Revised Code, not set aside on challenge, together with such number of bystanders having the qualifications of jurors as is necessary to make the number of twelve on the jury, or, if the whole array is set aside, twelve of such bystanders having such qualifications and not set aside on challenge, is a lawful jury for the trial of a person charged with a capital offense. Either party may demand and have a special venire to fill the panel. When it is necessary to summon talesmen, the court on motion of either party shall select them and issue forthwith a venire for such number having the qualifications of jurors as is necessary. Such jurors shall appear at such time as is fixed by the court, but a person in or about the courthouse shall not be selected without the consent of both parties. If a cause has been assigned for trial, and the jury for the trial thereof has been drawn, and the cause continued to another term of court, the jury so drawn shall be discharged and a new jury drawn for the trial of such cause. If such trial has commenced and there is not time to conclude it at the same term of court, the cause may be concluded at the next term of court.

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name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 134 v H 511. Eff 1-1-74.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his

Committee Comment

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; and (7) felony murder.

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Ohio Rev. Code Ann. Sec. 2903.01 (Page 1975). *Aggravated murder.*

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Sec. 2923.03 (Page 1975). *Complicity.*

(A) No person acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

(2) Aid or abet another in committing the offense.

* * *

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section or in terms of the principal offense.

Ohio Rev. Code Ann. Sec. 2929.02 (Page 1975). *Penalties for murder.*

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

* * *

Ohio Rev. Code Ann. Sec. 2929.03 (Page 1975). *Imposing sentence for a capital offense.*

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the

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charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury.

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(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Sec. 2929.04 (Page 1975). *Criteria for imposing death or imprisonment for a capital offense.*

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt.

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(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president-elect of the United States, or the governor-elect or lieutenant-governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detention, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense or it was the offender's specific purpose to kill a law enforcement officer.

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(7) The offense was committed while the offender was committing kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Ohio R. Crim. P. 11(C)(3) (Page 1975). *Pleas of guilty and no contest in felony cases.*

With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge

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is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

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